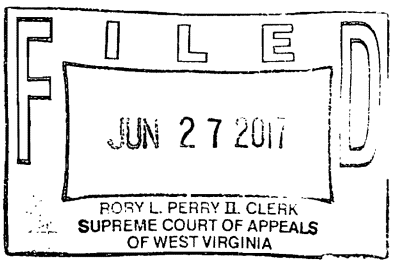
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 17-0086



ALLEN V. MCINARANAY and
ARLENE S. MCINARNAY,
PETITIONERS,

vs. Appeal from a Final Order of the Circuit Court of Monroe County (06-C-35)

PEGGY T. HALL, FRANK HALL,
RUSSELL TESTERMAN, JR., ISSAC
RIVER TESTERMAN and CECILIA
LEE TESTERMAN,
RESPONDENTS,

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Allen V. McInarnay and Arlene S. McInarnay,

Defendants Below, Petitioners,

vs. No. 17-0086

Peggy T. Hall, Frank Hall, Russel Testerman, Jr.,
Isaac River Testerman and Cecilia Lee Testerman,

Defendant Below, Respondents,

PETITIONERS' REPLY BRIEF

Comes now the Petitioners, by and through counsel, John H. Bryan, and for their Petitioners' Brief, submits the following:

ARGUMENT

I. REPLY TO RESPONDENTS' BRIEF

Section "2" of the Respondents' Brief argues that the Petitioners filed to submit a proposed jury verdict form pursuant to W. Va. Trial Court Rule 23.02. However, their argument would have been more appropriate for the Circuit Court prior to the Court adopting the verdict form. Given that Petitioners' counsel has tried numerous jury trials before the Circuit Court of Monroe County, in everything from murder trials through real estate trials, counsel was aware of the Court's practice in regards to verdict forms. In counsel's experience, the Court generally crafts a verdict form following the presentation of evidence and rulings pertaining to jury instructions. In any event, the Respondents failed to object to the verdict form crafted by the Court and expressly agreed-to by the parties and counsel. Nor did they object to Petitioners' counsel not submitting a proposed verdict form three days prior to trial.

Section "3" of the Respondents' Brief argues that intent to abandon cannot be inferred from actual use of the roadway. However, the only easement case law available pertaining to abandonment involves courts inferring the parties' intentions by looking at their actions, as well as the physical status of the roadway itself. Right of way abandonment cases are almost entirely fact dependent, and "[w]hat particular actions would constitute proof of intent to abandon an easement would necessarily depend on the unique facts of each case." Strahin v. Lantz, 456 S.E.2d, 12, 15 W. Va. 285 (W. Va. 1995); 6B Michie's Jurisprudence Easements § 18 at 167.

In Strahin v. Lantz, this Court addressed the factors necessary to show termination of an express easement by abandonment.[1] The Court adopted the majority rule and held that abandonment of an easement is a question of intention "that may be proved by nonuse combined with circumstances which evidence an intent to abandon the right." Strahin v. Lantz, 456 S.E.2d 12, 15, 193 W. Va. 285 (W. Va. 1995). There has been very little specific guidance from this Court on what such circumstances must look like, other than each case depends on its unique facts. In Strahin, a fence and a gas line were constructed across the subject roadway. Additionally, the area was grown over by small trees. However, the evidence showed that the owner of the adjacent property, Mr. Strahin, invested money to improve his land in order to construct a residence, presumably utilizing the subject roadway for access.[2]

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[1] Strahin concerned abandonment of a prescriptive easement. However, the Court noted in footnote 5 that prescriptive easements should be treated the same as easements created by deed. *See* Moyer v. Martin, 101 W. Va. 19, 131 S.E. 859 (1926) (The methods of extinguishment of prescriptive easements and easements created by deed should be identical).

[2] Strahin did not mention whether or not Mr. Strahin had alternative access to the proposed residence.

Neither Strahin nor Downing House Realty v. Hampe, 497 A.2d 862, 127 N.H. 92 (N.H., 1985) involved a court setting aside a jury verdict, but rather involved appellate review of the findings of trial court judges. The case sub judice involves a total lack of knowledge regarding what particular facts convinced the jurors that the right-of-way had been abandoned. The only real standard for abandonment cases is that they are almost entirely fact-dependent. What particular actions would constitute proof of intent to abandon an easement would necessarily depend on the unique facts of each case. Strahin v. Lantz, 456 S.E.2d 12, 15 193 W.Va. 285 (W.Va., 1995); 6B Michie's Jurisprudence Easements § 18 at 167.

Although it cannot be known which specific facts swayed this jury, it can be known that there were many facts to choose from, including the jurors' own observations during the jury view of the subject roadway. This included guidance from expert witness, professional surveyor David Holz. Holz walked the jurors through the Petitioners' property and showed the jurors where the roadway originally ran. The jurors saw the spot where the old roadway branched off from the existing road. They saw a fence and gate barring the old roadway where it separated from the current road. Jurors saw a forest grown up over the old roadway with no bridge crossing the stream in the vicinity of the old roadbed. Then, getting closer to the Petitioners' home. They saw that the old roadbed ran through what is now a pond and marshy tall-grass area run-off area with pond drainage running where the road used to run.[3]

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[3] There is no transcript showing what the jury saw, and what the jury was told, during the jury view of the property. As such, it is virtually impossible to say what evidence each individual juror gleaned from their visit to the property. However, photographs admitted into evidence do show the same areas viewed by the jurors.

The jury could observe that on the second half of the old road, the roadway was long used as a trash dump, containing a large heap of debris, also shown in photographs entered into evidence. Clearly, the parties had the requisite intent to abandon the old road route. Petitioners' predecessors built a new driveway to their home in an entirely different location, abandoning and shutting off the old route. The driveway was not extended to the Respondents' property, evidencing the fact that the roadway was not meant to serve the Respondents' property. Instead, a fence was erected between the properties. Later, a hole was cut in the fence to allow Petitioners' predecessor to transfer cattle in between the two properties. But the cut in the fence, connecting two fields, was not located on the original ancient road, and there was no discussion between the parties of making the cut in the fence a roadway, or a route into the Respondents' property.

The elected county surveyor, David Holz, testified as an expert witness in the field of professional surveying. He was hired by both parties to locate the old road (Transcript at 198). He testified that there was no physical signs of the old roadbed for about half the length of the old roadway. (Transcript at 196-97). In order to ascertain where such sections existed, he had to use a map and create coordinates of where the road should have been (Transcript at 197). The section which had disappeared completely now contained tall grass, a fence and a pond (Transcript at 199). The back half of the old roadbed, which the Respondents were not seeking to use, still visible to Mr. Holz as a clear roadbed, still fairly-level and even fenced in some places on both sides. In the opinion of Mr. Holz, with the use of a bulldozer, the Respondents could have made the back section of road usable (Transcript at 199-200). Instead, the

Respondents were seeking a new roadway through the back section of the Petitioners' property, through the middle of the Petitioners' field, which Mr. Holz found was not the location of the original roadway (Transcript at 197-98). Instead, he testified that there "were some tracks, but no permanent road. "(Transcript at 198).

Timothy South, who was a farm hand on the property for Plaintiff's predecessors' Dr. and Mrs. Pike, from approximately 1987 to 2005, testified that in the 15 to 17 years he worked on the property, he was never aware of any roads crossing the property heading towards the Respondents' property (Transcript at 203-204). He never once saw Respondent Peggy Hall cross the Petitioners' property. Other than giving Peggy's sister Linda a ride across the Petitioners' property two times, he never saw her cross the property on her own (Transcript at 204). Dr. and Mrs. Pike kept a gate across their driveway which was locked most of the time (Transcript at 205). It was always Mr. South's understanding, from his conversations with the Respondents, that they entered their property from Dropping Lick Road, and not across the Petitioners' property (Transcript at 206).

Mr. South testified that a fence separated the parties' properties, but that he and Dr. Pike farmed cattle on both properties. He stated that he and Dr. Pike cut a hole in the fence around 1987 to allow cattle to travel between the properties. He never saw any of the Respondents going through the cut in the fence (Transcript at 208-210). Prior to cutting the hole in the fence, the fence was solid and nobody was driving through the fencing (Transcript at 215).

Petitioner Alan McInarnay testified that he was originally shown the property by a realtor. At that time, it was still owned by Dr. and Mrs. Pike. They walked the property

first, fell in love with it, and eventually made an offer (Transcript at 219). The Petitioners had no indication that there was once a right of way on the property. The realtor did not mention it. The Pikes did not mention it. As Mr. McInarnay testified, "it would have been a deal-breaker." They thought they were buying a place secluded from civilization. They wanted to be in the "middle of nowhere just with each other" (Transcript at 219-20). Mr. McInarnay personally examined the property and saw no indication there was an old road crossing the property and serving a third party. He saw no indication of any roadway running through what is now their alpaca field (Transcript at 220-21). They had a routine title search on the property when they purchased it, and nothing was told to them regarding an old road on the property. Likewise, their deed did not mention any easements or old roads (Transcript at 224-25).

Elizabeth Pike testified in her deposition, which was read to the jury and admitted into evidence as an exhibit, that in her twenty-five years owning the Petitioners' property, she never once saw the Respondents crossing her property (Pike Deposition at 7:16-7:22). By the time the Pikes had purchased the property in 1980, there was no longer any visible "ancient roadway." Mrs. Pike was aware of the existence of an ancient right of way because adjoining landowner Kathryn Wickline told her about it (Pike Deposition at 15:2-23, 16:1). Mrs. Pike did not personally know where the roadway used to exist. (Pike Deposition at 15:23, 16:1). She never saw anyone use the ancient road during her period of ownership, which was 1980 through 2005 (Pike Deposition at 16:2-5).

Respondent Peggy Hall's mother, Gladys Testerman, was the Respondents' predecessor in title. Her deposition was also read to the jury and admitted into

evidence. Her testimony illustrated that the agreement between the Testermans and the Pikes was to allow the Pikes to graze cattle on the property - and not to allow the Testermans to use their driveway, or property for ingress and egress. (Gladys Testerman Dep. 13:3-13:13). There was no discussion regarding using the Pike property as a roadway, or changing the ancient route of the road. (Testerman Dep. 14:5-14:23). *See also* (Elizabeth R. Pike Dep. 13:11-14:2,16:21-17:5). The gap in the fence installed by the Pikes was never intended to serve as an access route. Instead it was intended only for the transfer of cattle. (Pike Dep. 14:8-15:1). Respondents' predecessor, Gladys Testerman, admitted in her testimony that she doesn't recall ever crossing onto the Petitioners' property (Gladys Testerman Dep. at 15:1-23; 16:15-18).

Janice Gill testified at trial, who owned the Petitioners' property in the mid-seventies (Transcript at 96-97). She testified that she never saw anyone attempting to drive through her property to reach any properties to the rear. As far as she understood, the road that led up to her farm was the last farm, or the last property, on the roadway (Transcript at 99). They raised calves and pigs. She didn't recall any roads crossing through the property. Nobody ever asked her to travel through the property. She knew the Testermans, and it was her understanding that they used Dropping Lick Road in order to access their property (Transcript at 99-100).

David Crawford testified at trial, who, from 1994 to 2006, owned the property on both sides of the road at the beginning of the disputed roadway, where it meets route 219 (Transcript at 105-105). He lived on the property and knew both the Pikes and the Testermans. He testified that there were two gates on his part of the roadway and that he never once saw the Testermans, or any of their family members, using the road

(Transcript at 105-106). He testified he was familiar with the roadway up to the Pike property and had traveled onto the Pike property. He stated that to his knowledge, there was never any active roadway during that period of time used by anyone to access the Respondents' property. He confirmed that the Pikes also had a gate blocking the roadway (Transcript at 107). Mr. Crawford corroborated other witnesses testimony that the Testermans accessed their property solely from Dropping Lick Road (Transcript at 108-109).

The Respondents argue that no evidence was presented at trial showing their intention to abandon the open use of the ancient roadway. However, evidence was presented showing that they privatized the other end of the old ancient road, engaging in the same conduct as the Petitioners' predecessors.

Respondent Peggy Hall admitted that they maintained two gates on the roadway entering their property from Dropping Lick Road, and that no keys were given to the McInarnays - though that roadway would technically be the other end of the same ancient roadway (Transcript at 168-169). Thus, the Respondents treated their end of the roadway where it meets Dropping Lick Road as their own private entrance, but then objected to the Petitioners doing the same. The evidence showed the jury that long ago the Respondents and their predecessors abandoned the ancient road running through Petitioner's property in favor of the opposite end of the road where it meets Dropping Lick Road. The old roadbed became grown up, forgotten, turned into ponds, fences, pasture, and in some places, lost to the human eye. Trash was piled up on one section. Pastures were fenced off. Fences were built, and subsequently cut to allow cows to graze. All-the-while owners of the Petitioners' property testified they never once saw the

Respondents attempting to travel through their property. A new road to the Petitioners' home was bulldozed, through no assistance of the Respondents, and thus even the Petitioners abandoned the old route in favor of a modern driveway entrance cut higher up onto the hill. That new road never extended to the Respondents' property. It ended at the Petitioners' home.

The jury correctly concluded that the original 1908 right of way was abandoned. They further correctly concluded that there was insufficient evidence that the original right of way was moved to the Petitioners' driveway, or the alpaca field towards the cut in the fence. The only available evidence showed that the driveway was created solely by the Petitioners' predecessors, as a driveway to their home, and that it did not extend onto the Respondents' property line. The evidence showed that the route sought by the Respondents through the Petitioners' alpaca field was nothing more than a route to transfer cattle by Dr. Pike, who ran cattle on both parties' properties. There was no evidence of an agreement pertaining to a right of way between the Pikes and the Testermans. The Respondents held the burden of proof by clear and convincing evidence to establish any right of use over the driveway or the alpaca field. The burden was impossible given the testimony of Mrs. Testerman and Mrs. Pike that no agreement existed.

Section "4" of the Respondent's Brief argues that a failure to renew a Rule 50(b) motion does not preclude the grant of a new trial under Rule 59. Respondents' argument under Rule 59 essentially is that it would be a miscarriage of justice to allow the verdict to stand, and that such relief is appropriate under Rule 59. However, they failed to respond to any of the Petitioners' arguments pertaining to their failures to move

for judgment as a matter of law at any point during the trial. They failed to respond to any of the Petitioners' arguments pertaining to their failure to object to the sufficiency of the evidence, prior to the case being submitted to the jury.

Following the close of evidence, the Respondents chose not move for judgment as a matter of law / directed verdict and the case was submitted to the jury following instructions from the Court.[4] The Circuit Court gave the opinion that the issue was not whether a right-of-way existed, but rather, whether the right-of-way was abandoned, and if not, the location of the right-of-way (Transcript at 261). The Circuit Court further stated that it had researched the issue of abandonment and that the issue of abandonment must be proven by clear and convincing evidence (Transcript at 264-65). The Court prepared a verdict form, and noted that one of the options would be termination by abandonment. Though asked if they had any objection, Respondents' counsel gave no objection (Transcript at 268-69). There were no concerns brought forth, either by the Court, or by the Respondents, regarding any alleged insufficiency of the evidence.

Following the charge and instructions, the jury deliberated and returned with a verdict finding that the 1908 express right of way to the Petitioners' property, over the Respondents' property, has been terminated by abandonment, and that the Petitioners' have no right of way over the Respondents' property. Following the reading of the verdict, the Circuit Court stated:

> All right. Well, congratulations and condolences, as the case may be, to both sides for a hard-fought case. Both of you did a good job. There's always winners, and there's losers. And that's the unfortunate thing about this. But I

[4] Neither did Respondents move for judgment as a matter of law at the close of Plaintiffs' case-in-chief.

think everybody - nobody's disgraced their self. Everybody can hold their head up. So be it. So good luck to you.

(Transcript at 292).

Under Rule 59, a trial judge has the authority to find that a jury verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, and may set aside the verdict and grant a new trial. Morrison v. Sharma, 200 W. Va. 192, 488 S.E.2d 467 (1997). However, a "party may not gamble on the verdict and later question the sufficiency of the evidence." Chambers v. Smith, 198 S.E.2d 806, 809, 157 W. Va. 77 (1973). Nor may a party seek a new trial under Rule 59 based on insufficiency of the evidence where the party failed to move for judgment as a matter of law / directed verdict under Rule 50 during the trial or at the close of evidence. Id. ("Even if a motion for new trial is made for insufficiency of the evidence, the failure to move for a directed verdict forecloses the question on appeal").

The Respondents entire argument for a new trial under Rule 59 consisted of only one sentence: "Respondents presented no evidence at trial which indicated that Petitioners intended to abandon their express easement across Respondents' property." The remainder of the Respondents' six page motion consisted of a Rule 50 motion, which accordingly had to be denied due to failure to move for Rule 50 during trial. Given the fact that Respondents were primarily arguing under Rule 50, their entire memorandum and argument complained of alleged insufficiency of evidence of abandonment. However, at the trial, the Respondents never mentioned insufficiency of evidence. They failed to mention evidentiary concerns following the Plaintiff's case-in-chief; they failed to mention it at the close of all evidence; they failed to mention it at

their opportunity to object to jury instructions pertaining to abandonment; they failed to mention it at their opportunity to object to the Court's verdict form giving an option for termination by abandonment. Similarly, neither did the Court mention any concerns regarding insufficiency of evidence of abandonment. Respondents gambled on the verdict, lost, and only later questioned the sufficiency of the evidence. Thus, following the holding in Chambers, for the Court to grant a new trial under the circumstances *sub judice* is an abuse of discretion. Id., 198 S.E.2d at 809 ("The failure to move for a directed verdict forecloses the question [of insufficiency of evidence] on appeal).

Like the petitioner in Chambers, the Respondents herein failed to move for a directed verdict at the close of evidence.[5] This Court held that such a failure was tantamount to an admission that the evidence was sufficient, and thus not reviewable on appeal:

> Even if a motion for a new trial is made for insufficiency of the evidence, the failure to move for a directed verdict forecloses the question on appeal. A party may not gamble on the verdict and later question the sufficiency of the evidence."

Chambers v. Smith, 198 S.E.2d 806, 809 (W. Va., 1973). The Court in Chambers reiterated that "we are of the opinion that, in the posture of this record, the defendant, even under Rule 59, could not receive the alternative relief of obtaining a new trial."

Similar to the facts in Chambers, the defendant made a Rule 50 motion, or in the alternative, a Rule 59 motion, and included very little specificity for the alternative Rule 59 portion of the argument. The Court held that additional specificity was required:

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[5] Though the petitioner in Chambers did move for a directed verdict at the close of their case-in-chief. But the motion was not renewed at the close of evidence. The Respondents herein failed to make a Rule 50 motion at any point during the trial.

> The first ground cited in support of the relief sought is that the verdict is contrary to the law and the evidence. Rule 7(b), R.C.P. provides that the grounds for a motion seeking an order of a court shall be stated with particularity. This Court has recently held, and we adhere thereto, that grounds for a motion for a new trial must be stated with particularity and if this is not done the motion should not be considered. 'Merely stating that 'The verdict is contrary to the evidence' has been held not to be sufficient to meet the requirements of stating the grounds with particularity.' Steptoe v. Mason, 153 W.Va. 783, 172 S.E.2d 587. *See* 5 Wright and Miller, Federal Practice and Procedure, Section 1192, 2A Moore, Federal Practice and Procedure, Section 7.05; 6A Moore, Federal Practice and Procedure, Section 59.09.

Chambers v. Smith, 198 S.E.2d 806, 810 (W. Va., 1973).

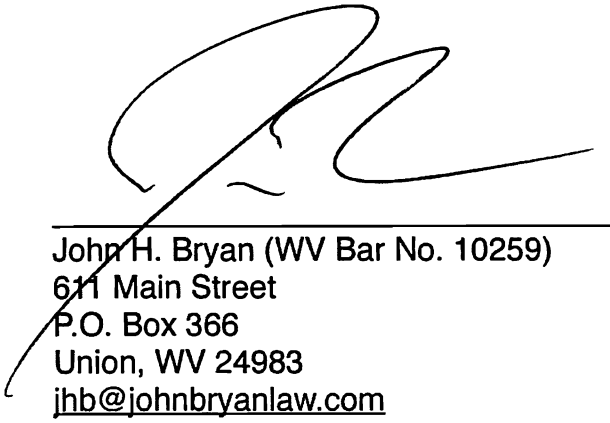
The Respondents failed to address any of these long-standing legal principles. As such, their brief should be deemed to have admitted that Rule 59 relief is unavailable in their circumstances.

CONCLUSION

The Respondents are grasping at straws in order to justify the Circuit Court granting a new trial. Using the Circuit Court's logic - insufficiency of evidence - the proper avenue of relief would have been Rule 50. Neither the Respondents, nor the Court, should be allowed to circumvent Rule 50 by using Rule 59. The Respondents should not be allowed another bite at the apple. The law has been well settled that insufficiency of evidence is not appropriate under Rule 59. Examining the evidence, the record provides an adequate basis for the jury's conclusion that the roadway was terminated. Their visual observations of the property alone were enough. Strahin v. Lantz, 456 S.E.2d, 12, 15 W. Va. 285 (W. Va. 1995), and the cases cited therein, looked at the physical attributes of the then-existing roadway, coupled with the parties' actions, in order to determine intent. The jury herein observed every indication of the parties' intent to abandon: non-use, coupled with physical barriers placed in the old roadway, as

well as both parties using alternate means of access. Such is the extent of what evidence of intention to abandon looks like. Had there been a written declaration of abandonment, no trial what have been necessary.

As such, the Petitioners respectfully request that the December 28, 2016 order setting aside the jury verdict be overturned, and that the jury verdict and ensuing judgment order be reinstated.



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CERTIFICATE OF SERVICE

I, John H. Bryan, do hereby certify that I have provided an original and five copies of this motion and delivered a true copy of the foregoing PETITIONER'S REPLY BRIEF upon counsel of record by depositing the same in the United States Mail, postage pre-paid, this the 26th day of June, 2017, and addressed as follows:

David L. Ziegler, Esq.
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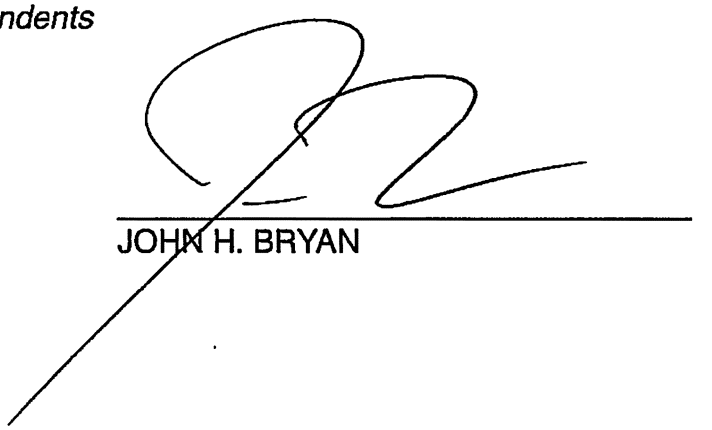
Counsel for Respondents



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